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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Chrono

SPECIAL

March 29, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

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SUBJECT: Draft DOJ report on H.R. 4696, a bill "To clarify the relationship of the Privacy Act of 1974 to the Freedom of Information Act, and for other purposes."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

COB Wednesday, April 4, 1984.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: K. Wilson C. Wirtz R. Veeder F. Fielding M. Uhlmann
A. Donahue

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Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman
Committee on Government Operations
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter requesting the views of the Department of Justice on H.R. 4696. This bill would amend the Privacy Act of 1974, 5 U.S.C. § 552a, to provide that the exemptions to access contained in that Act could not be used as a basis for withholding records that would otherwise be accessible to requesters under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. This bill relates to an issue that is currently pending in the courts, including the Supreme Court. For the following reasons, the Department of Justice strongly recommends against enactment of this proposed legislation.

The purpose of this bill is essentially to reverse the Department's present litigation position on the relationship between the Privacy Act and the FOIA. Although many courts have adopted the position that the Privacy Act's exemptions meet the requirements of Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), */ this bill would preclude agencies from relying on the Privacy Act's exemptions as a basis for withholding

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*/ Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), provides that an agency need not disclose matters that are--

> "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

(Footnote Continued)

requested information under the FOIA. The Department's position that the Privacy Act should be considered an Exemption 3 statute under the FOIA is perhaps best explained in the Solicitor General's petition for certiorari in United States Dep't of Justice v. Provenzano, No. 83-1045 (filed Dec. 23, 1983), a copy of which is enclosed for your convenience.

Briefly, the factors that led the Department of Justice to change its policy by adopting the position that the Privacy Act qualifies under Exemption 3 of the FOIA as a nondisclosure statute are as follows. The Department reconsidered its previous position in late 1981, following the decision in Greentree v. United States Customs Service, 515 F. Supp. 1145, 1147-49 (D.D.C. 1981), in which District Judge John Lewis Smith, Jr. concluded, even though neither the plaintiff nor the Department of Justice had advocated the position, that the Privacy Act does qualify as an Exemption 3 statute.

When the plaintiff appealed, it became necessary for the Department to determine whether to defend Judge Smith's ruling before the Court of Appeals for the District of Columbia Circuit. In making this determination, the Department took into account that both the Fifth and Seventh Circuits had previously held, again sua sponte, that the FOIA cannot compel

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(Footnote Continued)

The Privacy Act requires, in 5 U.S.C. § 552a(d), that an agency upon request must disclose information to individuals who are the subject of information contained in a system of records, but contains several exceptions from this disclosure requirement. For example, § 552a(j)(2) specifically authorizes an agency to exempt a system of records from disclosure if it is--

> "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision."

disclosure of information that has been properly exempted under the Privacy Act. See Painter v. FBI, 615 F.2d 689, 690-91 (5th Cir. 1980); Terkel v. Kelly, 599 F.2d 214, 216 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). Indeed, the D.C. Circuit itself had suggested that the two acts should be read in such a way. See Duffin v. Carlson, 636 F.2d 709, 711 (D.C. Cir. 1980) (dictum).

Only after reviewing these decisions, carefully reexamining the legislative history of the Privacy Act, and consulting with other interested agencies did the Department decide to change its policy and to defend Judge Smith's ruling on appeal. Although this argument was unsuccessful in the D.C. Circuit, Greentree v. United States Customs Service, 674 F.2d 74 (D.C. Cir. 1982), a number of district courts in other circuits have endorsed the Department's position. See, e.g., Martin v. FBI, Civ. No. 82-C-123 (N.D. Ill. Sept. 30, 1983); Rachel v. United States Dep't of Justice, Civ. No. 83-C-0434 (N.D. Ill. Aug. 1, 1983); Turner v. Ralston, 567 F. Supp. 606 (W.D. Mo. 1983); Anderson v. Huff, 3 Gov't Discl. Serv. ¶ 83,124 (D. Minn. June 8, 1982); and Heinzl v. INS, 3 Gov't Discl. Serv. ¶ 83,121 (N.D. Cal. 1981).

More recently, the courts of appeals in the Third Circuit and the Seventh Circuit have issued full opinions addressing this issue, and have reached squarely conflicting decisions. The Third Circuit's opinion in Porter v. United States Dep't of Justice, 717 F.2d 787 (3d Cir. 1983), adopted the rationale of the D.C. Circuit in Greentree and ruled against the Department's position. (A companion case, Provenzano v. United States Dep't of Justice, 717 F.2d 799 (3d Cir. 1983), was decided similarly in a brief per curiam opinion relying on Porter.) By contrast, the Seventh Circuit ruled squarely in support of the Department's position in Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983), concluding that the D.C. and Third Circuits' decisions had failed to take into account the plain language of the Privacy Act and FOIA Exemption 3 and, moreover, that their decisions led inevitably to the insupportable result that Congress intended the Privacy Act's carefully drafted limitations on an individual's access to agency records to be almost meaningless.

In the Provenzano case, after the Third Circuit denied the Department's petition for rehearing en banc over the dissent of four of the court's ten judges, the Solicitor General filed a petition for certiorari on December 23, 1983 (No. 83-1045). The unsuccessful plaintiffs in Shapiro have also filed a petition for certiorari (No. 83-5878). We are hopeful that the Supreme Court will agree to resolve the current dispute between the circuits and, ultimately, rule in favor of the Department's position.

We find the Seventh Circuit's reasoning in Shapiro to be the most persuasive on the relationship between the Privacy Act

and the FOIA. As the Seventh Circuit concluded (721 F.2d at 222):

> "In summary, the legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA."

Thus, we take issue with the premise underlying this bill that the Department's present policy is an unsupported change in the congressional policy underlying the Privacy Act. Our present policy, by contrast, is intended to give effect to the indications of congressional concern, by preventing individuals from using the FOIA to circumvent and thereby nullify the Privacy Act's carefully drawn exemptions. See, e.g., 5 U.S.C § 552a(j)(2) (systemic exemption for criminal law enforcement records). As explained fully in the Seventh Circuit's opinion in Shapiro, this approach is intended to give effect to the provisions of the Privacy Act that provide specific authority to withhold certain types of records from individual access. Thus, our position was reached on the basis of a number of court decisions, some of them not even sought by the Department, that have upheld this construction of the Privacy Act and the FOIA.

The Department believes that, in addition to this historical perspective, there are valid policy reasons to allow agencies to use the law enforcement exemptions of the Privacy Act in responding to requests for access under the FOIA. The Department and many other government agencies have long experienced difficulties under the FOIA as amended in 1974, particularly with the requirements of Exemption 7. The Federal Bureau of Investigation and other law enforcement agencies, for example, have compiled a list of over 200 instances in which the FOIA has interfered with effective law enforcement. The use of the Privacy Act exemptions in conjunction with Exemption 3 of the FOIA will -- and, we believe was intended to -- complement the protection afforded to such sensitive law enforcement materials under Exemption 7.

During the course of extensive hearings, the Senate Judiciary Committee has considered a great deal of evidence on the shortcomings of the FOIA's exemptions. After careful consideration, that Committee has twice voted unanimously to make significant changes in the language of the FOIA exemptions responsive to the concerns presented by the law enforcement community. On February 27, 1984, the Senate approved this legislation, with minor amendments, without dissent.

In the House, however, there has been no consideration of these legislative improvements. No hearings have even been held on the subject since an initial inquiry during the summer of 1981. Thus, the urgently needed legislative relief reflected in the Senate bill still has a long legislative road ahead before it is ultimately enacted by the Congress.

Given this delay in the enactment of FOIA reform legislation, we believe that it would be unseemly, premature, and inappropriate for the House to act on a bill whose effect would be to remove an exemption -- an exemption we believe was intended by Congress -- for information from the most sensitive law enforcement files of our law enforcement agencies.

It should be understood that, at present, the government has not changed its position in processing FOIA requests at the administrative level. The Department recognizes the practical problems, as long as the circuits remain split on this issue, with the assertion of Privacy Act exemptions and FOIA Exemption 3 as the basis for withholding records under the FOIA. The Department's current policy, pending resolution of this issue, is not to rely, at the administrative level, on a claim that the Privacy Act is an Exemption 3 statute. Thus, the effect of the government's position on requesters is limited, until the legal issues surrounding this position can be finally resolved.

Before concluding, we will address one concern expressed in the statements accompanying the introduction of H.R. 4696 -- the possibility of a "third-party anomaly." Those statements asserted that a third-party FOIA requester could conceivably receive greater access to an individual's file than could the subject of the file himself. For the following reasons, we do not believe that this possibility sheds any light on the construction of the Privacy Act itself or its underlying legislative history. The so-called "third-party anomaly" could occur only in a case in which records have been exempted from access under the Privacy Act, but are otherwise available under the FOIA. While such a possibility exists, the likelihood of its occurrence is extremely rare.

In most cases, third parties are prevented from obtaining access to records in exempted systems concerning another individual because such records are protected from mandatory disclosure pursuant to FOIA Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6) and (7)(C). These exemptions permit an invasion of privacy only when the interest in preserving privacy is outweighed by a countervailing public interest in disclosure. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Fund for Constitutional Government v. National Archives & Records Service, 656 F.2d 856, 862 (D.C. Cir. 1981).

For example, the Department of Justice generally refuses even to acknowledge the existence of law enforcement records

pertaining to a third party unless there has been some previous public acknowledgment of the relevant investigation. See, e.g., Rushford v. Civiletti, 485 F. Supp. 477, 479-81 (D.D.C. 1980), aff'd mem., 656 F.2d 900 (D.C. Cir. 1981). The Seventh Circuit has specifically upheld this practice in Antonelli v. FBI, 721 F.2d 615 (7th Cir. 1983), a case in which the FBI refused to confirm or deny the existence of records on several third parties in its investigative files, because even admitting that such records exist would threaten the privacy interests of those third parties. As a general rule, the only information generally made available to the requester from law enforcement files is that information already publicly available, such as newspaper clippings or court transcripts.

Therefore, even in the rare case where an actual anomaly might arise, the third-party requester generally would receive very limited information: the type of information already available to the public and the first-party requester.

In conclusion, the Department recommends against enactment of the proposed legislation. The Department's current position on the relationship between the Freedom of Information Act and the Privacy Act is supported by an analysis of the language and history of the two statutes, as well a number of judicial decisions. This construction best affords the protection needed and intended for the law enforcement agencies' most sensitive files. We are hopeful that the Supreme Court will soon grant review of the conflicting appellate decisions on the Privacy Act as an Exemption 3 statute under the FOIA. We note, however, that the Department is recommending that the Privacy Act exemptions not be applied in responding to FOIA requests at the administrative level until the status of the Privacy Act under Exemption 3 of the FOIA is finally resolved.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the President's program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General
Office of Legislative Affairs

Enclosure

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,
PETITIONERS

v.

ANTHONY PROVENZANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RICHARD K. WILLARD
Acting Assistant Attorney General
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QUESTION PRESENTED

Whether Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), is a withholding statute within the scope of Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act.

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